

United States
Circuit Court of Appeals
For the Ninth Circuit.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Plaintiff in Error,

vs.

LESLIE WILLARD, a Minor, by JOSEPH J.
LAVIN, His Guardian Ad Litem,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the
Eastern District of Washington, Northern Division.

Filed

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F. D. Monckton,
Clerk.

No. 2753

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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*In the District Court of the United States for the
....Eastern District of Washington, Northern Divi-
sion.*

No. 2344

LESLIE WILLARD, a minor, by his Guardian *ad*
Litem, R. B. WILLARD,

Plaintiff,

vs.

GREAT NORTHERN RAILWAY COMPANY, a
Corporation,

Defendant.

Complaint.

Plaintiff complains and alleges:

I.

That Leslie Willard is a minor of the age of 10 years, and that R. B. Willard, has heretofore, by order of the Superior Court of Spokane County, State of Washington, been appointed guardian *ad litem* of the person and interest of said minor, with authority to institute, prosecute and maintain this action as such. That the plaintiff is a citizen, resident and inhabitant of the State of Washington.

II.

That defendant is a corporation organized and existing under and by virtue of the laws of the State of Minnesota, owning and operating a line of railway extending from Spokane, northerly through the town of Springdale, Stevens County, Washington, at which latter place it owns and maintains tracks, depot and right of way, and said grounds, tracks and right of

way intersects, crosses and is contiguous to a public street, avenue and thoroughfare, of said city of Springdale.

III.

That for some months prior to the happening of the accident hereinafter referred to, defendant, for use in and upon its line of railway, piled and stored, upon its right of way, and within [3*] two feet of the line of said public street hereinbefore referred to, a large number of wooden railway ties, said ties weighing upwards of 300 pounds each, and being piled in about ten rows of eight ties high in each row, or the entire pile consisting of about eighty ties, and when so piled, there was on top thereof a level and clear surface upon such structure so constructed.

IV.

That said ties were piled in a populous part of the town of Springdale, upon unenclosed premises owned by the defendant, abutting upon, and adjacent and contiguous to a public street, were unprotected and unbraced to keep the same from falling, and for a number of months prior to the date of the happening of the accident hereinafter referred to, said pile of ties and said structure was enticing, alluring and attractive to children of tender years, both boys and girls, and said pile of ties was of such character as to be attractive to children, and of such character as to appeal to childish curiosity and instincts, and for a number of months prior to the date hereinafter referred to, a large number of children attracted

*Page-number appearing at foot of page of original certified Record.

thereby, played in, upon and about the premises of defendant, upon and about said structure and said pile of ties, all of which was known by defendant, or in the exercise of ordinary care should have been known by defendant.

V.

That on or about the 23d day of February, 1914, Leslie Willard, being at said time of the age of 9 years, and not knowing or appreciating the dangerous condition of the premises of defendant, went upon said pile of ties, and had no sooner reached the top thereof when a large number of ties fell from said pile, throwing him to the ground, and said ties falling upon him, inflicting the injuries hereinafter complained of.

VI.

That the cords, muscles, tendons and nerves, and the bones [4] of the right leg in and about the knee joint were severely crushed, bruised and injured, causing exostosis; that the bones surrounding and involving the right knee joint were so badly crushed and injured, that a large body of bone has formed in and around said knee joint, rendering said knee permanently stiff, and plaintiff is unable to bend or flex the same, and will forever suffer great pain and inconvenience from said injuries, will be prevented from doing any work or labor requiring the use of said leg, and is and will be forever, a cripple, and will be required in future to move about with great pain, difficulty and inconveniences, and will thereby be compelled to suffer chagrin,

humiliation and mortification on account of his crippled condition.

VII.

That said accident was caused and occasioned solely by through the negligence of defendant, its agents, servants and employees.

1. In piling and placing said ties in a dangerous, unsafe, inadequate and careless manner.

2. In failing to brace, protect and secure said ties, so that the same would not fall.

3. In permitting said dangerous structure and pile of ties to be and remain where children were accustomed to play.

4. In failing to exercise ordinary care in keeping said place in a reasonably safe condition.

5. In leaving said ties exposed and unprotected in a dangerous and unsafe condition.

VIII.

That by reason of the facts hereinbefore referred to, plaintiff has been damaged in a large sum, to wit, the sum of \$20,000.00, no part of which has been paid.

WHEREFORE plaintiff demands judgment against the defendant in the sum of \$20,000.00, and his costs and disbursements herein. [5]

(Signed) PLUMMER & LAVIN,

Plaintiff's Attorneys.

State of Washington,

County of Spokane,—ss.

R. B. Willard, being first duly sworn, deposes and says: That he is the duly appointed guardian *ad litem* of Leslie Willard, the plaintiff herein; that he

has read the foregoing complaint, knows the contents thereof, and that the same is true.

(Signed) R. B. WILLARD.

Subscribed and sworn to before me this 25th day of September, 1915.

[Seal] (Signed) JOSEPH J. LAVIN,
Notary Public for the State of Washington, Residing
at Spokane.

[Endorsements]: Complaint. Filed in the U. S. District Court for the Eastern District of Washington, October 5, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [6]

[Title of Court and Cause.]

Answer.

Now comes the above-named defendant and answering the complaint of the plaintiff herein and
I.

FOR A FIRST DEFENSE THERETO:

1. Said defendant denies any knowledge or information sufficient upon which to form a belief as to the allegations of Paragraph I of said complaint, and therefore denies the same.

2. Said defendant admits the allegations of Paragraph II of said complaint.

3. Said defendant admits that at the time of the accident described in said complaint, it, the said defendant, had a pile of railway ties upon the right of way of said defendant in the town of Springdale, Stevens County, Washington.

4. Said defendant specifically denies the allegations of Paragraph IV of said complaint.

5. Said defendant admits that on or about the 23d day of February, 1914, said Leslie Willard suffered some injuries at or near the town of Springdale, Washington.

6. Said defendant admits that at the time of said accident the said plaintiff suffered some injuries to his knee.

7. Said defendant specifically denies the allegations of Paragraph VII of said complaint. [7]

8. Said defendant specifically denies that the plaintiff has been damaged by any negligence on the part of said defendant, either in the sum of twenty thousand dollars (\$20,000) or in any sum whatever.

9. Said defendant specifically denies each and every allegation, matter and thing in said complaint contained except as is hereinbefore specifically admitted.

II.

FOR A SECOND DEFENSE:

1. Said defendant reaffirms and alleges all those matters and things contained in and set forth in paragraphs 1 to 7, inclusive, of said defendant's first defense hereto.

2. Defendant denies each and every allegation, matter and thing in said complaint contained, except as is hereinafter specifically admitted.

3. Said defendant alleges that any injuries suffered by plaintiff were caused by the negligence and carelessness of him, the said plaintiff, and of the said plaintiff's parents, and not by the negligence and

carelessness of the defendant, and that the said negligence and carelessness on the part of said plaintiff and his parents were efficient causes which contributed to cause whatever injuries plaintiff suffered at the time of said accident.

WHEREFORE, defendant prays judgment that plaintiff take nothing by his complaint and that it have and recover its costs and disbursements herein.

(Signed) CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Defendant. [8]

[Endorsements]: Answer. Due service of the within Answer by a true copy thereof is hereby admitted at Spokane, Washington, this 27th day of December, A. D. 1915. (Signed) Plummer & Lavin, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, December 29, 1915. W. H. Hare, Clerk. By S. M. Russell, Deputy. [9]

[Title of Court and Cause.]

Reply.

Comes now the above-named plaintiff, and replying to defendant's answer herein:

I.

Denies paragraph 3 of defendant's second defense.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

State of Washington,
County of Spokane,—ss.

W. H. Plummer, being first duly sworn, deposes and says: That he is one of the attorneys for the above-named plaintiff; that he makes this verification on behalf of the plaintiff for the reason that plaintiff is at this time out of Spokane County; that he has read the foregoing reply, knows the contents thereof, and that the same is true.

(Signed) W. H. PLUMMER.

Subscribed and sworn to before me this 31st day of December, 1915.

[Seal] (Signed) JOSEPH J. LAVIN,
Notary Public for Washington, Residing at Spokane,
Wash. [10]

[Endorsements]: Reply. Service of the within reply is acknowledged this 3d day of January, 1916. (Signed) Charles S. Albert, Attorney for Defendant. Filed in the U. S. District Court for the Eastern District of Washington, January 4, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [11]

[Title of Court and Cause.]

Verdict.

We, the jury in the above-entitled cause, find for the plaintiff, and fix the amount of his recovery at the sum of fifteen hundred dollars (\$1500.00).

(Signed) H. J. MARTIN,
Foreman.

[Endorsements]: Verdict. Filed January 22, 1916. W. H. Hare, Clerk. [12]

[Title of Court and Cause.]

Judgment.

This cause having heretofore come on regularly for before the Court and a jury, plaintiff appearing in person and by his attorneys, Plummer & Lavin, and the defendant appearing through its attorneys, Charles S. Albert and Thomas Balmer, and said cause having been regularly submitted to the jury, and the jury having retired to deliberate upon the verdict, and thereafter having returned their verdict into the court, awarding to the plaintiff the sum of \$1500.00;

It is hereby ORDERED, ADJUDGED and DECREED, that upon the verdict of said jury, and the Court being fully advised in the premises, that plaintiff have and recover against defendant the sum of \$1500.00, and his costs and disbursements hereafter to be taxed.

Done in open court this 26th day of January, 1916.

(Signed) FRANK H. RUDKIN,

Judge.

O. K. as to form:

(Signed) CHARLES S. ALBERT and
THOMAS BALMER,

Defendant's Attorneys.

[Endorsements]: Judgment. Filed in the U. S. District Court for the Eastern District of Washing-

ton, January 26, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [13]

[Title of Court and Cause.]

Motion for New Trial.

Now comes the above-named defendant, and moves the Court for an order to set aside the verdict of the jury herein and grant a new trial of the above-entitled cause, upon the following grounds:

1. Excessive damages appearing to have been given under the influence of passion or prejudice.

2. Insufficiency of the evidence to justify the verdict.

3. Error in law occurring at the trial and excepted to by the defendant.

4. That neither the evidence nor the testimony is sufficient to show, either directly or indirectly that the defendant or anyone for whom it was responsible was guilty of any negligence, or that it was guilty of any breach of duty which it owed towards the plaintiff.

5. That the evidence is not sufficient to show that a cause of action has been proven against the defendant, either as alleged in the complaint or otherwise.

6. That the evidence is insufficient to show a cause of action against the defendant, in that the accident which happened to the plaintiff, was caused by the act and negligence of himself and his companion, who was with him, and not by reason of any negligence on the part of the defendant.

7. That the evidence was insufficient to support a cause [14] of action against the defendant, in that it was not shown that the ties in question were in their nature alluring or attractive to children, or that they were in or of themselves dangerous, nor was it shown that even if they were not alluring or attractive to children, that if children played about them they were obviously dangerous if such children came in contact therewith.

8. That the Court erred at the trial in allowing the witness, R. B. Willard, to answer the question: "Do you know how many ties fell?"; that the Court erred in denying the defendant's motion for nonsuit made at the close of plaintiff's case; that the Court erred in refusing to allow the witness C. W. Magers to answer the question: "Mr. Magers, just tell how these ties were piled": that the Court erred in refusing to admit Defendant's Exhibit 7 in evidence; that the Court erred in denying the defendant's motion to direct a verdict for the defendant at the close of all the testimony.

Said motion is based upon the pleadings and papers on file, upon the minutes of the court, including not only the clerk's minutes, but any notes or memorandum which may have been kept by the Judge of this court in the trial thereof, and also the reporter's transcript of his shorthand notes of said trial.

Dated at Spokane, Washington, this 31st day of January, 1916.

(Signed) CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Defendant.

I certify that the filing of the within motion is allowed this 31st day of January, 1916.

(Signed) FRANK H. RUDKIN,
Judge. [15]

[Endorsements]: Motion for New Trial. Due service of the within motion by a true copy thereof, is hereby admitted at Spokane, Washington, this 31st day of January, 1916. (Signed) Plummer & Lavin, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, January 31, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [16]

[Title of Court and Cause.]

Order [Denying Motion for New Trial].

This cause coming on to be heard upon defendant's motion for a new trial, the above-named defendant appearing by Charles S. Albert and Thomas Balmer, its attorneys of record, in behalf of said motion, and the above-named plaintiff appearing by his attorneys, Plummer & Lavin, in opposition thereto, after hearing said motion and the Court being duly advised in the premises:

It is ORDERED that said motion be, and the same is hereby denied, to which ruling defendant excepts

and exception is allowed.

Done in open court this 7th day of February, 1916.

(Signed) FRANK H. RUDKIN,
Judge.

[Endorsements]: Order Denying Motion for New Trial. Filed in the U. S. District Court for the Eastern District of Washington, February 7, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [17]

[Title of Court and Cause.]

Bill of Exceptions.

BE IT REMEMBERED that heretofore, to wit, on the 21st day of January, 1916, one of the days of the September Term of the United States District Court for the Eastern District of Washington, Northern Division, before Honorable Frank H. Rudkin, Judge of said court, presiding, this cause came on for trial on the pleadings heretofore filed herein.

This was an action at law to recover damages for personal injuries sustained by the plaintiff, alleged to have occurred by said plaintiff falling from a pile of ties at Springdale, Washington, upon the defendant's right of way, upon the 23d day of February, 1914.

Plaintiff appeared in person and by Messrs. Plummer & Lavin, his attorneys, and the defendant appeared by Charles S. Albert and Thomas Balmer, its attorneys, and a jury being duly impanelled and sworn to try the case, the following proceedings were had and testimony taken.

An opening statement to the jury was made by Mr. Lavin for the plaintiff.

Thereupon the following proceedings were had:

Plaintiff offered a certified copy of the order of the State Court appointing the guardian *ad litem*, which was objected to [18] by the defendant, and thereupon the said plaintiff asked the Court to appoint Joseph J. Lavin as guardian *ad litem* of the plaintiff, which appointment was made.

[Testimony of Leslie Willard, in His Own Behalf.]

Thereupon LESLIE WILLARD, being called as a witness in his own behalf, and being first duly sworn, testified as follows:

TESTIMONY OF LESLIE WILLARD.

My name is Leslie Willard, I will be twelve years old next February, the 21st. I live at Springdale and have lived there nine or ten years. I am going to school. I have been going to school about six years, I guess. I remember the 23d day of February, 1914, when I was hurt on some ties at Springdale. These ties were just a little ways from the wagon road, about two or three feet. (6) That is the wagon road that runs across the railroad track. There is a path right by the side of the ties, two or three feet from them. That was the only road that runs across the railroad track at Springdale. I don't know how close these ties were to the railroad track. I don't know how high these ties were piled.

Mr. ALBERT.—I think it is admitted in the answer that they were about eight ties high. (7)

Being further examined by Mr. Lavin on behalf of

(Testimony of Leslie Willard.)

the plaintiff, Leslie Willard, testified:

I played on this pile of ties once before I got hurt that I know of. I might have played there more. I played around them about six weeks before with just one more boy.

Q. How did you happen to go there to play?

A. We were just playing around. We were just playing around there first and then we thought we would go up and play wood tag, and so we went up on top and played wood tag. If anybody gets off of the wood, touch them or they will have to touch you. When you are on wood they can't touch you and when you are off they can. We would climb up on top of that pile of ties. The next time I [19] happened to go there there was a team getting weighed and some men around it and we couldn't see and we went up on top to watch the team. (8) We had not been playing on the ties that day before that time. I was climbing up on the end of the ties on the side of the pile to watch the team and they fell down. I was climbing up on the end of the ties. I climbed up on the end of the ties and they fell down with me. (9) I fell to the ground. I don't know how many ties fell, about six to nine though. I don't know how many fell upon my body. I don't know when I fell to the ground in what position I was lying. I think I was lying on my side. I don't know. The ties were laying across my legs; I don't know how many. They fell on my right leg. The first one I remember who was to me after I had fallen was John Taylor. I didn't see Mr. Williams, the

(Testimony of Leslie Willard.)

livery-barn man. (10) John Taylor took the tie off of me before I could get up. There were other people around there. I didn't have any pain in my right leg then, but just a little while after I did. I tried to walk, but I couldn't; it hurt so bad. My right leg hurt so badly. Mr. Newton carried me home. Two or three days after I got home the doctor came, Dr. Lewis. (11) All I can remember is he called three times, but he called more I think and examined my leg. I don't know how long I was in bed. Sometimes I have pain in my leg now, not all the time. Sometimes two or three days, and sometimes every day. I can bend my right knee joint a little bit. I run sometimes. When I run I throw my right leg out to the side. I have difficulty in putting on my shoes. (12) I can't reach down to my foot to get them off.

My leg is about the same as time has gone on. At first I could bend my leg all right, but after awhile it grew stiff. By standing up I can bend my knee a little. That is as far as I can bend it. I can't bend it lower than that. It hurts. (13) I have to throw my leg out when I run; it won't bend up.

Sometimes [20] when I walk I have to throw it out. I walk along here in front of the jury and I run in front of the jury. (13) I noticed while I was playing on these ties how close together they were piled. The ties were about three inches apart. They had ice underneath them. (15) I never saw boys playing around those ties before.

Q. You were never out around the ties but the two

(Testimony of Leslie Willard.)

times that you have testified to?

A. I have been around the barn up there. The barn is about 90 or 100 feet from the ties.

The COURT.—Were they hewed or sawed ties?

Mr. ALBERT.—They were hewed ties. (16)

Cross-examination.

Whereupon the witness was cross-examined by Mr. Albert and testified as follows:

At the time I first went there before I fell, about six weeks before, Jimmy Stevens was with me. On the day that I was hurt Murtha Cline was with me. He is here. (17) The first time I went there I got up on the ties. That was six weeks before. That was the time I was playing wood tag. If you touch wood you are all right. That is the way you play it. It doesn't make any difference whether you are on wood, over it or anything of that sort, just so you touched it, you were free. That was what I was doing the day I was playing up there with Stevens. His first name is Jimmy. Six weeks after this Murtha and I were up there. We were just watching the horses and the men gathered around there, then I went up there. I went up there to watch the horses. The men were gathered around there when they were weighing the horses. (18) That was what I was watching. Before that I was standing right in there, this side of the barn, about half way from the barn to the ties. The scales where they were weighing the horses were between me and where the barn was. Up away from the road fur-

(Testimony of Leslie Willard.)

ther. When they brought these horses along there Murtha and I [21] started to go down to get onto the ties. These ties were piled along there in a long pile. I don't know how long the pile was. At the time I was playing wood tag down there before, I got up on the top of the ties (19) and walked over the ties. They didn't any of them fall with us, and we got down off of them all right, and we got up on them all right. The ties were piled about the same, just as they were the last time I got on or tried to get on. At the time we tried to get on, I was on the end of the ties and the side of the pile. (20)

The ties were piled with one end towards the railroad track and the other end was piled away and I got down on the corner of the pile. I was taking hold of the end of the ties and putting my feet in the end of them, and climbing up on top of them. I had just gotten up on the top on my knees when the ties fell. I had gotten on my knees on the end tie, when the tie started to fall, and when it fell I fell with it. Murtha was on the other corner on the end of the ties. When I fell the ties fell on me. I wasn't paying very much attention to how many ties had fallen. All I knew about it was there was a tie on my leg that was hurting me. At first somebody ran and took the ties off of me, and then another man carried me away. They picked these ties off first and then another man, Mr. Newton, came along and picked me up and carried me home. The doctor

(Testimony of Leslie Willard.)

came two or three days after this. There were two or three days in there when he didn't come at first at all, and then he came three or four or five times afterwards. (22) I don't remember his coming any more. That was Dr. Lewis and he was the only doctor we had. He lived at Springdale. I and my father live there now. I didn't see Mr. Williams around there. When I say that the ties were three inches apart, I was referring to the holes that are in there between the ties. (23) The ties were round and were pile eight of them right on top of each other. I mean there was about three inches of ice and stuff [22] underneath them, as they were lying on top of each other. There might not have been three inches. It might have been two or three inches.

Q. When did you see this?

A. I seen the snow underneath them?

Q. Yes.

A. When I looked there before, there was a little snow underneath them. (24) When I was up there before I saw some ice and snow between each of the ties. They were piled up there one on top of the other, eight high. The second time I went up there I didn't look to see if there was any ice or snow under them. I remembered what I had seen before, and I thought it was just the same the second time as it was the first. These ties that were piled in there, the next row of eight ties were right close to the first row and so on, all the way back, pushed up against each other. (25)

(Testimony of Leslie Willard.)

Redirect Examination.

Upon redirect examination by Mr. Lavin he testified:

I paid attention to how the different tiers of ties were together. They were together against each other. Before I got hurt they were right together to each other. There was no brace or timber against the end that fell, and the end from which I fell was the end that was closest to this path I have described. (26)

Recross-examination.

Whereupon, upon recross-examination by Mr. Albert, he testified:

The path that I am talking about is that path running alongside of the road. The end of the pile was right up by the path. That is the side of the tie. The side of the tie was on the side of the path and on the other side of the path was the road. The path was right up next to the road and the ties were two or three feet from the path. (26, 27)

Redirect Examination.

Whereupon, upon redirect examination by Mr. Lavin, he testified: [23]

The schoolhouse is on the north side of the track. The pathway was used by some of the school children going from the southern part of the town to the schoolhouse on the north side. (27)

Recross-examination.

Whereupon, upon recross-examination by Mr. Albert, he testified:

(Testimony of Leslie Willard.)

I live right down in the middle of town. The most of Springdale is north of the track. There is a lively barn and a few houses on the south side of the track. The track runs generally east and west. My home is about two or three blocks from the track. My father ran a restaurant there. I lived in the restaurant building. When I went from the depot to the restaurant I had to go about two blocks. The depot is right near this place where I had the accident, just on the other side of the road. (28, 29)

[Testimony of Dr. C. F. Eikenbary, for Plaintiff.]

Thereupon Dr. C. F. EIKENBARY was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

TESTIMONY OF DR. C. F. EIKENBARY.

(Examined by Mr. LAVIN for the Plaintiff.)

I am a physician and surgeon engaged in the practice of my profession since 1903.

Whereupon the doctor's qualifications were admitted by Mr. Albert.

I made an examination of the plaintiff in September, 1915. The examination concerned only the knee. The boy complained of an inability to bend and extend the knee as far as normal and the examination was concerned entirely with that and the making of an X-ray picture of the knee. (30)

The physical examination shows that he has, back of the knee, of the right knee, a mass of bone which is probably an inch in length, and how wide it is not possible to state—may be an inch [24] wide or

(Testimony of Dr. C. F. Eikenbary.)

may be not more than half that width, that lays almost directly back of the knee joint, which obstructs the movement of the joint. At the time I examined the boy he was able to extend his leg—that is to put it out in this way—within five degrees. In other words, he had forty degrees of motion at that time. The X-ray showed this mass of bone back of the knee.

This view on the left is a picture of the knee taken from before, backwards, straight through the knee joint, and really I would not be positive that it shows anything. I rather think that this little area here is the mass of bone but I would not be sure of that. But the lateral view, the view from side to side, shows a mass of bone back of the knee joint, and shows a roughening of this region here as if there had been a thickness or tearing up of the covering of the bone which is represented by this mass of the joint, and this is the mass referred to in this region. This is practically a mechanical way of obstructing that joint. (31)

This mass of bone that I have described looks as if it had grown to the other bone. He can move his leg now at an angle of forty degrees possibly without very much pain. If he should attempt to go beyond that angle it probably would produce pain.

Whereupon Mr. Albert admitted that whatever injury the boy suffered, as far as the knee was concerned, he assumed was caused by the accident. (32)

(Testimony of Dr. C. F. Eikenbary.)

Cross-examination.

Whereupon, upon cross-examination by Mr. Albert, the witness testified:

I have had considerable experience in these bone fractures, anklyosis and all that sort of thing, bony growths. I am constantly engaged in work of that sort. That is my specialty. In connection with it I have performed many operations. No operation has been attempted upon this boy yet.

Whereupon the following proceedings were had:

Q. To remove that bone would not be a difficult operation? [25]

Mr. LAVIN.—Just a minute. We object to that as incompetent, irrelevant and immaterial.

Mr. PLUMMER.—And not cross-examination. We did not ask him any questions about mending the leg or anything in reference to that.

Mr. ALBERT.—Well, now, if they are going to object to it on that ground I ask the privilege of the Court now to make Dr. Eikenbary my witness on that point.

Mr. PLUMMER.—All right.

The COURT.—To save time you may proceed.
(33)

Direct Examination.

Whereupon Dr. Eikenbary on direct examination by Mr. Albert testified as follows:

I regard an operation around the knee joint as being a serious operation. This is what is called a posterior growth. The knee cap itself or the front part of the knee joint would probably not be touched

(Testimony of Dr. C. F. Eikenbary.)

by the operation at all. It is hardly possible you could remove this growth without entering the joint cavity. You might not, but you probably would. I perform operations on the knee joint quite frequently, four or five a month. This is a feasible practical operation, and I would not hesitate to perform this operation if the matter were put in my care. (34) There are no two cases of knee joint operations that are alike and it would not be possible to say definitely as to time. I should say in the ordinary and normal course of treatment it might take three weeks or several months. I think the chances of getting a good result are pretty good. I don't think you could promise it positively, but I think the chances of getting a good result that would be satisfactory, would be very good. I mean a result that would be satisfactory to the boy. I think that the limitation of the range of motion could be increased. He has now motion to within five degrees of a straight line and an inflection of forty-five degrees and I think that probably could be increased. Whether it [26] could be increased so that he would have the full range of motion I do not know. That would be a very hard thing to tell. It might fall somewhat short of that. My best judgment is from my experience from these operations, I think undoubtedly the chances of his getting a good result would be very good. (35) I think you could feel fairly safe in promising him that he would have a great deal more motion than he has now. Whether that would be as good as the other knee or

(Testimony of Dr. C. F. Eikenbary.)

not I would hesitate to tell you that. I think the chances are he would get a good result. I wouldn't be limited as to time. In my best judgment I should say anywhere from a month to a number of months, from one month to three or four. (36) The reasonable value of such services until you are sure of the case, as I say, might be anywhere from one month to three or four, would be about three hundred dollars.

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer, he testified as follows:

I base my opinion of the result of this operation on the experience of the knee joint surgery in general. I don't know that I have ever had a case where I had just exactly that shaped mass in exactly that location. It is always possible in an operation that certain conditions might arise which you do not anticipate when you start in. (37) In case an operation is performed I think the chances of his getting a satisfactory result are fairly good. We doctors don't guarantee results any more than lawyers do. I should feel very badly if the operation might cause his leg to be in a worse condition than it is now. We wouldn't anticipate anything of that kind. It is true doctors have lots of things occur that they don't anticipate. (38) I should doubt if the leg would be as good as before, but I think it would be a result that would be satisfactory to him, better than it is now. I believe he would be a good deal better off.

(Testimony of Dr. C. F. Eikenbary.)

Redirect Examination.

Whereupon, upon redirect examination by Mr. Albert, he [27] testified:

When I say that the leg might perhaps not be as good, he might have a range of motion that would go anywhere from a straight line to say ninety degrees or even a hundred degrees, which for all intents and purposes would be a perfectly good knee, and yet not have quite the range of motion in it that a normal knee has, but for all ordinary work it would not make much difference. (39)

Recross-examination.

Whereupon, upon recross-examination by Mr. Plummer, he testified:

All joints are complicated. The knee joint is a complicated joint. I don't know that it is the hardest to handle and treat. I don't believe it is any more difficult to handle the knee joint, probably not as difficult as it is to handle the elbow joint, although it is a difficult thing. The elbow and knee joints are the most complicated of the joints we go into. (40)

Whereupon the X-ray plate was offered in evidence, marked Plaintiff's Exhibit 1, and was admitted without objection.

[Testimony of Dr. E. L. Kimball, for Plaintiff.]

Thereupon DR. E. L. KIMBALL, called as a witness on behalf of the plaintiff, being first duly sworn, testified:

I am a physician and surgeon in the practice of

(Testimony of Dr. E. L. Kimball.)

my profession. I have been practicing medicine and surgery for forty years and am duly licensed in this state. I have seen Leslie Willard. I made an examination of his leg Monday or Tuesday of this week. My examination consisted of an examination of the knee alleged to have been injured. It was made in connection with Dr. Baker. (41)

Our examination did not comprise the plate that was made, and which we were told had been made on the case, but there is, to the sense of touch, a bony growth on the back and inner side—or at the back of the right knee joint, of the upper bone, of that joint that belongs to the thigh, here, and the limitation of motion is as I heard Dr. Eikenbary describe it, just about perhaps forty degrees [28] —I mean a little over thirty, into the right angle from a straight line to an up and down line, a limitation of motion to about a third perhaps of the motion that the limb should normally have; with an expression of considerable pain in the boy when I tried to force it beyond the point where the obstruction came to show itself. There isn't any other symptom or condition that we could see except that limitation of motion and this lump, which shows in the back of the joint, with the pain, which is very evident when you give the leg more forcible movement.

He has to shorten his step quite a little with that right leg, as he walks, and he cannot run to any very lively extent. Kids, of course, will do most anything, but there is a marked limitation of movement

(Testimony of Dr. E. L. Kimball.)

even in his walk, or in the stride which he takes. The condition which I found there is absolutely permanent now.

Q. Is there anything that you know, either through your experience or practice, medical or surgical, that could be done that could relieve the condition that you found?

A. Well, that raises the question. It is very easy to cut and saw, and to open up the parts there, and chisel off this lump, a merely mechanical job which does not require in that particular part any great skill to do, but a great thing in surgery, of course, is to prevent such injury, and such infection as creates inflammatory conditions around there. While that lump could be chiseled off, it is a question what I would do with it if it was my own boy, and I should hesitate quite awhile before I would let anybody touch him, for fear that an infection or inflammation of the joint might make the joint much stiffer than it is, or might endanger his life. (42, 43)

[Testimony of Dr. A. C. Baker, for Plaintiff.]

Thereupon Dr. A. C. BAKER, being called as a witness on behalf of the plaintiff and being duly sworn, testified as follows: [29]

TESTIMONY OF DR. A. C. BAKER.

I am a physician and surgeon. I have been engaged in that profession fourteen years. Am a graduate of the University of Kansas. I made an examination of the plaintiff in this case in connection with Dr. Kimball. We found a swelling at the

(Testimony of Dr. A. C. Baker.)

posterior of the knee joint, and a limitation of motion, and some thickening of the ligaments around the knee joints; that always accompanies stiffness. The condition in which I found him was permanent. The mass of bone which I found there was perhaps an inch or an inch and a half of bone, lengthwise. A successful operation could probably be performed which would relieve the condition to some extent. In the case of an infection it would involve danger in that he might get a stiff knee. That is not one of the results that ordinarily follow an operation of the joint, but in a certain small percentage.

[Testimony of Harry Whitney, for Plaintiff.]

HARRY WHITNEY, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

TESTIMONY OF HARRY WHITNEY.

I am 17 years old. I have lived in Springdale for seventeen years. I was in Springdale the day that Leslie got hurt. I don't remember for sure. I know the pile of ties described. I have played on these ties before. I have been on them sometimes two or three times a day, and maybe I would not be on there for a couple of days. (46) We were on there nearly all winter, some time during the winter. Sometimes there would be four or five boys playing there, and sometimes only two or three. We were playing on them just for fun, playing wood tag. Just get up on the ties and run around up on the tie pile and run around over the ties. They were

(Testimony of Harry Whitney.)

kind of piled up and down. When they are piled this way they are piled close together, and sometimes they are not piled close together, sometimes they were. In some places the openings between the tiers were about (indicating two inches) and other places smaller and in other places bigger, in some places. [30] (47) This pile of ties was about 100 feet from the depot, I judge. There was no obstruction between the depot and this pile of ties. From the pile of ties you could see the depot. There were no houses around the ties in that neighborhood. Only one barn that I know of. The pile of ties was about 15 or 20 feet from the road. There is a pathway there. The pathway is about 15 feet from the ties. I live on the north side of the track. (49) That is the same side the depot is on.

Cross-examination.

Whereupon, upon cross-examination by Mr. Albert he testified:

I played on the ties pretty nearly all winter, part of the time. We wasn't on just one certain pile, we were all over on all the piles. There were other piles there. Those piles were a little further east of the road than this pile was. They were all piled on the south side of the track. There was some on the west side of the road, some on both sides. The yards are on the west side. It was about an even number of ties on each side. We got up on top of these ties, down off of them and ran all over them. (50) None of them ever fell with me. I don't know of

(Testimony of Harry Whitney.)

any of them falling except what I knew about Leslie. I didn't see the ties being brought in at any time. I don't know who brought them in, or how they got there. I didn't pay any particular attention to this particular pile of ties that Leslie got hurt on. I don't recall particularly with reference to just how that was piled up there. (51)

[Testimony of Claire Willard, for Plaintiff.]

CLAIRE WILLARD, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

TESTIMONY OF CLAIRE WILLARD.

I am a brother of Leslie, aged 17. I live in Springdale, have lived there about ten years. I have played on this pile of ties referred to in the testimony. Every once in awhile I would be on them. One day I would be on and then I wouldn't be on for [31] quite awhile. It would be along in the evening. It would not be very long. Sometimes in the afternoon. I have been on the tie pile with them, but I have not noticed how many boys was on there, three or four. I have not noticed any more than that on them at any one time. I was there once in awhile while the ties were piled there. They was piled one on top of the other. Some was close together and others farther. They were apart all the way from that far down, for instance (illustrating) about eight inches. (53)

Cross-examination.

Whereupon, upon cross-examination he testified:

(Testimony of Claire Willard.)

I paid no particular attention to this particular pile before this, and don't remember particularly with reference to it at all. I played on there once a day, and then for a long time would not play there. When I played up and down on these ties none of them fell with me, and I never knew of them having fallen on anybody. (54)

[Testimony of Clifford Ragsdale, for Plaintiff.]

CLIFFORD RAGSDALE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

TESTIMONY OF CLIFFORD RAGSDALE.

I am fifteen years old, live in Springdale. I played on this pile of ties two or three times a day for an hour for about two months. Sometimes two or three or two to four boys would play there with me. This was before Leslie got hurt. These ties were piled on top of each other. Some were close together and some had holes in them. These holes would be about six inches.

Cross-examination.

Whereupon, upon cross-examination by Mr. Albert he testified as follows:

I played on these ties before. I played with Leslie on them before he got hurt, once. I was not around the day Jimmy Stevens was with him. I would get up on top of the ties, crawl up on them, (56) and sit down. I never had any difficulty with them. They never fell down with me. I never paid

any particular [32] attention to this particular pile of ties that was there. (57)

[Testimony of Ervin La France, for Plaintiff.]

ERVIN LA FRANCE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

TESTIMONY OF ERVIN LA FRANCE.

I am fifteen, live in Springdale. I know the pile of ties that has been described. I played there prior to the time Leslie was injured about half an hour for about a month. Two or three boys would be playing there. (58) Wood tag.

Cross-examination.

Upon cross-examination by Mr. Albert he testified as follows:

I didn't play with Leslie. I played with other boys. Some of the piles looked all right to me. I don't remember anything particular about this particular pile, or the way it was piled, or anything of that sort. None of these ties ever fell with me playing there. (59)

Redirect Examination.

On redirect examination by Mr. Lavin, he testified:

I live west of town, on the west side of the track. I wouldn't pass this pile of ties in going to school. (60)

[Testimony of Frank Veenhuis, for Plaintiff.]

FRANK VEENHUIS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

TESTIMONY OF FRANK VEENHUIS.

I am thirteen, live at Springdale. I go to school, and live on the south side of the track. In going to and from school I pass by the pile of ties described, about six times a day, about five feet from them on the roadway. I noticed five or six boys playing on the ties before Leslie was hurt. (61) Playing hide-and-go-seek and cross-tag. Had continued for two or three months. That occurred almost daily, at night most of the time before the train came in, after school. On Saturdays sometimes, too. I never paid any particular attention to this pile. I don't know how they were piled.

Cross-examination.

Whereupon, upon cross-examination by Mr. Albert, he [33] testified as follows:

I remember playing on this particular pile. I have seen a lot of the boys playing on that pile. (62) This was a couple of weeks we were playing on the pile. We didn't play all of the time on these ties. When we did play on them the ties did not fall. We did not play on them, we played around them. The other boys got on, but I didn't. The ties did not fall with them. (63)

[Testimony of George Williams, for Plaintiff.]

GEORGE WILLIAMS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

TESTIMONY OF GEORGE WILLIAMS.

I am in the livery business in Springdale. Have lived there about nine years. I know the pile of ties that has been described in the evidence. About one-third of the population lived on the west side of the track at Springdale. I operate a livery barn about a block from the ties. I know the pathway described. That pathway was eight or ten feet from the ties. (64) It was about thirty feet from the end of the ties to the middle of the traveled portion of the street. I couldn't say how close the ties were to the eastern limit of the street, side lines of the street; I have no idea. (65) That is the only street in Springdale that crosses the track from the north to the south side. All the children passing over this road to school have got to pass by this pathway. I was there on the day that Leslie Willard was injured. On that day I was going down town, and I heard the boys yelling, the children screaming, and this Leslie, and I ran to where he was at and lifted the ties off and I told him to get up from under the ties and he got up and went about thirty feet and commenced crying and fell down. (66) I had not observed this pile of ties before the date of the happening of the accident and paid no attention whatever to them. The boy was lying flat on his back and the ties between his legs. (67)

[Testimony of J. P. Brown, for Plaintiff.]

J. P. BROWN, called as a witness on behalf of the [34] plaintiff, being duly sworn, testified as follows:

TESTIMONY OF J. P. BROWN.

I have lived at Springdale for about four years. My business is well drilling. I am familiar with the pile of ties described. I never hauled any ties. I helped the Magers unload two loads of ties. Whether them was the ties that fell or not, I could not say. We unloaded them right near the street, on the south side of the depot, between the depot and the livery barn on the south side of the railroad track and on the east side of the street. On the east side of the roadway. (68) I should judge about seventy-five feet from the livery barn, and about the same distance from the railroad track. We placed the ties we unloaded close to the street, right near the street. I think this was in January, 1914. I had nothing to do with the ties, only to help Mr. Mager. They were not my property. He said they were too heavy for him to handle alone, and he asked me to go and help him. I handled these ties. Some of them were pretty heavy. They was tamarack and there was snow and ice on them, which made them pretty heavy to handle. I should judge they would weigh 300 pounds each. (69) Mr. Mager directed the place where they should be piled. I don't know whether any of the agents of the company were around there. Mr. Mager just drove up

(Testimony of J. P. Brown.)

there and unloaded the ties where he stopped, and threw some little poles down, probably three inches through, and we unloaded the ties, and I had nothing more to do. They were piled on top of the snow. I should judge there was a foot of snow under the ties, if not more. There was snow or ice when the ties were piled there. Some of them when they were piled were together or almost together and others would lay three inches apart. I didn't place any support or brace against them, or anybody else that I seen. I passed there a number of times and noticed the ties, and never noticed them being braced in any way. (70) [35]

Cross-examination.

Whereupon, upon cross-examination by Mr. Albert, he testified as follows:

I was helping Mr. Magers unload. He was a rancher; lived away from the track. He was bringing in the ties and delivering them on the right of way. Mr. Magers was alone when I helped him unload. I helped Mr. Magers, the father. We put down skids. I guess there was all of a foot of snow on the ground. We unloaded the ties on the skids. (71) The skids was put down on top of the snow and the ties laid on the skids. Some of the ties weighed 300 pounds. Couldn't say what date it was. It was near the first part of January, I am satisfied. It might have been in December. It was after Christmas. There was quite a number of ties piled between there and the railroad track, between

(Testimony of J. P. Brown.)

where we put ours and the railroad track. These ties were piled in ranks. There was a rank near the track and we were piling the rank upon the back, behind the first one, between that and the barn. So, as a matter of fact, this was not the one that was nearest the track that I had anything to do with. Didn't seem so to me. (73) Some of the ties would not go over 150 and others would weigh 300.

Redirect Examination.

Whereupon, upon redirect examination by Mr. Lavin, he testified:

I judge this pile of ties was about 100 feet from the depot, fronting across the tracks. I don't remember of ever seeing the agent of the company around there at any time while I was passing this pile of ties. I don't remember of seeing any of the officials around the ties. The depot extended up to the pile of ties, on the other side of the track and from the depot you can look across the track. (73)

[Testimony of C. W. Magers, for Plaintiff.]

C. W. MAGERS, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

TESTIMONY OF C. W. MAGERS.

I reside seven miles from Springdale. I farm a little [36] and log a little. Am familiar with the pile of ties described here. I sold them to the railroad company. Me and my son made them and hauled them and laid them there. I couldn't tell you when they were accepted, (75) or when I got my pay, the date, to save my life. These ties were

(Testimony of C. W. Magers.)

hauled somewhere from in December up until somewhere along in February. We hauled between seven or eight hundred of them altogether. There was about half of them accepted at first, and then we hauled another rick and made a double tier of it, and they was accepted later on. I could not say what time they was inspected. The ties went on the Great Northern, or the S. F. & N., a branch of the Great Northern; came through the Great Northern. (76) I got my check from the agent at Springdale, a check from the Great Northern Railway Company. I couldn't tell you exactly when we started hauling at this place, somewhere along the last of December or the first of January. I could not tell you just when we did start. I don't recall the accident to Leslie Willard. I wasn't there at the time. I don't know whether the agent told me where to put the ties, or whether I just pulled in there and went to unloading. I don't remember. I was to haul them down there anywhere I could find room and the first tier we put on there we put where the ties had been taken up. The first rick of ties was piled where they had been piled before. We piled as far as we had room and started on back of them. I should judge they were piled twenty-five or thirty feet from the center of the street, possibly somewhere from five to eight feet from the pathway. I don't know how far from the depot. It is right angling across the track from the end of the tie pile, angling across the track to the depot. The depot is on the opposite

(Testimony of C. W. Magers.)

side of the track. This would be towards the front side. (77, 78) I never saw any of the company officials around there while I was piling ties, the agent or anyone else, except the section foreman. He was there a day or two while we were unloading. We were still unloading on the twenty-third [37] of February, when this boy was hurt. (79) I don't know that I ever noticed him after we piled there. He was there while I was unloading a time or two, I am sure. I was talking with him once that I know of. Nobody on behalf of the company directed the manner or where these ties should be piled; nothing more than their bill in the depot. They specified the way they should be piled and the shape of the ties also.

Q. Did it describe the manner in which the ties should be piled?

A. Yes, sir, it described that they should be piled eight—

Mr. ALBERT.—Just a moment. That is objected to as not the best evidence.

Mr. PLUMMER.—We will ask counsel to produce one of those advertisements.

Mr. ALBERT.—I certainly shall. I have got it right here. That is what I have it for.

Q. Do you know how you piled these ties?

A. Eight high, on the first pile we put in there—piled them on tiers or culls that they had been piled on before. The back tier we throwed down some little poles we used on the sleigh to bind our ties on to hold them up. We piled them on the snow. I

(Testimony of C. W. Magers.)

can't say what depth it was; probably somewhere from ten to twelve inches deep. Some of the ties had snow and ice on them, and some of them did not have much on them. (80) Some of them would be piled up with a space between the ties; can't say just what it would be; possibly some might have an inch or two of ice on them and some of them had practically none on them, because they were hauled in as fast as they were made. Sometimes one of us would haul in and sometimes the other and some of them would have snow on them; in real bad weather it would freeze and make ice on them and others practically had no ice on them at all. The ties were not exactly of uniform height or uniform width. They ran [38] from six inches in width to probably fourteen or sixteen.

Q. And would you place a wide tie on top of a narrow tie?

A. Not many wide ones, but probably some of them twelve or fourteen inches, I suppose. We piled one on top of another. Some of them would be narrow and some of them would be wide, owing to the width of the ties. (81) There was no brace to prevent them from falling or slipping placed against them. (82) We put that pile down on the ground on the snow, and piled them one on top of the other, so they would run right from the bottom up and down. The wide ties and the narrow ties they went on just the same; if it was a wide one, they covered just that much more space, and if it was a

(Testimony of C. W. Magers.)

narrow one there was that much space between them. We did not endeavor to put the wide ones on the bottom. We started our pile wide enough so the ties would fit in there without having to crowd one over, if it was a narrow or a wide tie. We piled them like I piled lots of other ties, as far as that is concerned. (83)

Cross-examination.

Whereupon, upon cross-examination by Mr. Albert, he testified:

I and my two sons were engaged out in the country about seven miles from there, cutting ties. We would go out and cut these ties in the woods in the snow. In handling them there must necessarily some snow have gotten onto them and perhaps some little ice that came from the snow melting. That is the way we hauled them. Of course that is the way we did it. (84) They were made and hauled in and sometimes one of us took a load and sometimes another one would. They were hewn ties, not sawed, not square; they were peeled. Two sides were as flat as we could hew them and the sides were round. They came in various thicknesses, dimensions and widths. They were supposed to be and we tried to get them all the same length, according to specifications, but we couldn't make the sides exactly the same in the way we cut them. Then I and my two sons would haul these down to the depot, or down [39] to the right of way of the railroad company and pile them on the right of way. (85)

(Testimony of C. W. Magers.)

I couldn't tell you how many of these loads I hauled myself. Altogether there were seven or eight hundred ties there. We generally hauled from twenty to twenty-eight to a load. The first ties we put down there we put on ties where there had been other ties piled and the ties had been taken up. They were already laid there, the first ones were put on ties that had been piled there before. I didn't put nothing down. That was the first rick we put nearest the track. We took the place that was there and put the ties down upon it. (86) I knew that this was a place where these ties had been before. They had just been taken out of there, and I could see it. They had been fresh taken out of there; been moved some way. There wasn't any snow to any appreciable extent when we put these ties down in the first rank, which was the one nearest the track. We piled these bottom ties so that we would have, in building up the pile, to make an allowance for the ties that might be a little bit wider, so we would have room to put the ties in there. When we put the ties in, they were set pretty well together. (87) When we put the ties in we set up and piled as straight as you generally put them in that kind of shape. Of course, we couldn't make them perfectly solid with the snow and ice on them. Some of them didn't have snow and ice to amount to anything. The majority of them were not covered with ice. I couldn't tell when we commenced hauling. Might have hauled some in December. Can't tell you just

(Testimony of C. W. Magers.)

when we did start to haul. I have hauled ties there before. Piled them some place on the right of way where there is room. (88) We were supposed to be instructed by the agent where to put the ties. The usual time for hauling ties is in the winter. Most of the people up in that country haul at that time. We bring them in and dump them, make these skids for them, if there is snow or anything of that sort, put them down on skids and build up the pile. That is the way I have done. (89) [40]

[Testimony of R. B. Willard, for Plaintiff.]

R. B. WILLARD, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

TESTIMONY OF R. B. WILLARD.

I am the father of Leslie; reside at Springdale, have lived there in the neighborhood of eleven years. The first time I knew about Leslie having been injured was when Mr. Newton carried him in the door. He appeared to be suffering pain. He was kind of whining and crying a little. (91) I examined his leg at the time. I had him move his leg like that (indicating) and I says, "Leslie, can you move your foot?" He moved his foot. I said, "There is no bones broken." That was my idea of it. I didn't call a physician or surgeon then. I think it was the third day we called Dr. Lewis. He was in Springdale but left there a year ago this spring. I charged my mind that he made six trips. (92) The boy was placed in bed and remained in the neighborhood of—I think close to a month. He went on crutches for two or three weeks after he got out of bed, and

(Testimony of R. B. Willard.)

we watched him for a long time after that time and he seemed to be getting better. He moves about the same now as he has for the last year or fourteen months. We used different kinds of ointment on him, rubbed his leg, in accordance with the directions of the doctor. (94) In February, 1914, it was pretty nice weather. The very next day I went up there to see where he got hurt. I remember there was no snow there; it was all melted off; there was no snow there at all. It had been warm weather for about a month prior to the accident. It was like spring, pretty near summer weather some of the time, a little cool. (94)

Q. Do you know how many ties fell?

Mr. ALBERT.—I object to that as immaterial. His knowledge must be based upon what he obtained after the accident.

The COURT.—He can state how many ties were upon the ground.

Mr. ALBERT.—Isn't it for the jury to say what the condition [41] was that existed at the time of the accident, not at the time he went up there?

The COURT.—How long after the accident did you go there?

A. I think it was the next day.

The COURT.—I will permit him to answer the question. It is for the jury to say whether the conditions changed or not.

Mr. ALBERT.—I object to it on the ground that it is incompetent, irrelevant and immaterial and not

(Testimony of R. B. Willard.)

part of the *res gestae*.

The COURT.—Answer the question.

Mr. ALBERT.—Exception.

Exception allowed.

A. I can't say positively; six, seven, or eight; something like that, I can't say. There was part of two tiers fell and they were eight tiers high. (95) That was on the end of the pile nearest the street.

Cross-examination.

Whereupon, upon cross-examination by Mr. Albert, he testified:

I don't know how many ties was fallen. I had no idea of anything just more than seeing how well the boy got out of it. I think it was kind of summer weather up there for a month prior to this, if I remember it right.

**[Testimony of George Williams, for Plaintiff
(Recalled).]**

GEORGE WILLIAMS, recalled as a witness on behalf of the plaintiff, testified on direct examination as follows:

TESTIMONY OF GEORGE WILLIAMS.

I heard these ties fall and ran to the boy. I can't say how many ties were on the ground. I have an idea there was part of two tiers fell down.

Cross-examination.

Whereupon, upon cross-examination by Mr. Albert, he testified:

I couldn't say how many fell on the ground. (97)

[Testimony of C. W. Magers, for Plaintiff (Recalled).]

C. W. MAGERS, recalled as a witness on behalf of the plaintiff, testified on direct examination as follows: [42]

TESTIMONY OF C. W. MAGERS.

These ties were inspected by the railroad company before the accident to the boy.

Whereupon the following proceedings were had:

Whereupon the plaintiff rested and the following proceedings were had:

Defendant moved the Court for a nonsuit on the same grounds as hereinafter set forth in the motion to direct a verdict, which motion was denied and excepted to by the defendant.

Whereupon counsel for the defendant made an opening statement to the jury and introduced the following testimony. (99)

Defendant's Testimony.

[Testimony of Murtha Cline, for Defendant.]

MURTHA CLINE, a witness produced by the defendant, being duly sworn, testified as follows:

TESTIMONY OF MURTHA CLINE.

I am ten years old, live in Springdale. I have known Leslie Willard for several years. I remember being with him at the time he got hurt a couple of years ago. We were coming from school. We came up to town and then as we was coming up to the tie pile they was weighing some horses up there and so they was prancing around a little and so we

(Testimony of Murtha Cline.)

thought we would go up there for protection. We got up on the ties near where that curve is on the side. There is a few little places, and we kind of stuck our toes in there and climbed up and got hold of the top of the pile and pulled on the ties up there. He climbed up on the north side and I climbed up on the south side. I was nearer the barn and he was nearest the track. I didn't get on top. There was a few pieces of ice in between the ties and a little snow and it was thawing, and it slipped when we was going up. The ties slipped. (101) We had hold of the top ties when they slipped. We had not gotten up on top yet. Leslie wasn't up on top yet. Three of the ties came down on top of us and the fourth was just hanging up there. Mr. Williams came over [43] and helped us. I don't know who was on Leslie's side, but Mr. Williams lifted them off of me, from the end that I was on.

Cross-examination.

Whereupon, upon cross-examination by Mr. Lavin, he testified:

There were three ties on top of us boys after they had fallen down. (102) I was bruised. That was all I got. I was on the south side and Leslie was on the north side. The pile of ties was about 30 or 40 feet long. (103) I would step on the ties. When I was climbing up I was looking forward and wasn't paying any attention to Leslie, because he was going up himself on the other end of the ties.

(Testimony of Murtha Cline.)

Redirect Examination.

Whereupon, upon redirect examination, he testified:

The pile of ties was about 15 feet from the side of the road. Leslie and I went up there together. Leslie and I started from school for home and we got up there and went to watch them weigh and the horses were prancing around and we just got up there for protection. We both climbed up there, that is all I know. I had been up on the other end of that pile. (105)

[Testimony of Ben Magers, for Defendant.]

BEN MAGERS, a witness called on behalf of the defendant, being duly sworn, testified as follows:

TESTIMONY OF BEN MAGERS.

I am son of Mr. Magers who has testified here already. I live seven miles from Springdale, and recall piling these ties that have been referred to. My father and brother helped me. We started, I think, about the 12th of January to pile them, finished somewhere around about the 20th of February. We piled them eight high, one on top of the other. The first pile we put on was on old ties and the second pile we put on was on poles. The ones we put on old ties was nearest to the track. (106) The piles were different sizes. One was quite a good deal larger than the other. I should judge there was probably two or three hundred in the first pile, and the balance was in the other pile. We found these old [44] ties on the ground there and piled

(Testimony of Ben Magers.)

those on the old ties. We started piling the first pile from the west end and that is where we found the old ties. That is the end nearest the road. (107) I guess these ties were piled as solid as we could pile them. I suppose some of them were probably loose a little bit. There were big ones and small ones; they couldn't all be piled solid together, very easy.

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer, he testified as follows:

They were piled as solid as we could pile them. They certainly would have been more solid if we had put some braces up against the end, I guess. When we piled them, one tie for instance would be a narrow tie, and then a wide tie would be put on top of that, then there would be a wide tie and then maybe a small, narrow one. Each tier was connected with the other tier, close together. They was just brushed up together, is all. Each tier was independent of the other.

Redirect Examination.

Whereupon, upon redirect examination, he testified as follows:

They were leaning against each other; they were laying together. I never knew of a pile of ties ever braced anywhere.

Recross-examination.

Whereupon, upon recross-examination by Mr. Plummer, he testified:

(Testimony of Ben Magers.)

If there was a tie eight inches wide on the face and then there was another tie on top of that that was fourteen inches wide, the eight inch tie would not be leaning up against anything, just like a letter "I." (109)

Redirect Examination.

Whereupon, upon redirect examination by Mr. Albert, he testified:

We made these ties in the woods, seven miles out of town. Some were being made while we were bringing the others in. As we made them we brought them in and piled them on the right of way. [45] (110)

[Testimony of Frank Magers, for Defendant.]

FRANK MAGERS, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

TESTIMONY OF FRANK MAGERS.

I am a brother of the witness who was last on the stand and live in Springdale, and am son of the gentleman who testified here in the plaintiff's case. It was somewhere about the 12th of January when we started to pile these ties on the right of way. I do not recall how many loads we brought in. We were piling them from then until about the 20th of February. I recollect how they were piled. We were skidding them out of the woods with a team and then put them on a sled and took them to the right of way and put them on the right of way on poles or ties or whatever we could find. At the

(Testimony of Frank Magers.)

time we hauled them out of the woods we just threw them in as we come to them, the small ones and the big ones. When we got down on the right of way we piled them one on top of the other. Where the wide ones came together they went together. If there was a narrow one underneath a big one they didn't come together. We brought in ties before. They were required to fill certain specifications in order to sell the ties with reference to length, width and general thickness. (111, 112) The length and width and thickness of these ties were according to specifications. They were to be seven inches thick, eight feet long and seven inch base on both sides and peeled. They were uniformly of that size. (113) I don't think there were any that were less than eight and one-half inches through the flat way. I expect the largest ones were some of them fourteen inches. They ranged from fourteen to eight and one-half inches. While we were piling these ties I never saw any children around on them while we were there. I didn't know of any of them playing upon these ties. I have piled ties there before on the right of way two seasons. (114)

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer, he [46] testified:

We got these ties seven miles out of town. We would bring in one load and then go back for another. Would only be on the ground for a very few minutes. Most of the time would be in the trips

(Testimony of Frank Magers.)

back and forth, loading up in the woods. I don't know what pile fell; we had two different piles there. I don't think some of these ties were hauled there in December. We started in the first part of January. (116) I am not positive about the exact time. My best recollection is that we started on the 12th of January. (117)

[Testimony of D. S. Cameron, for Defendant.]

D. S. CAMERON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

TESTIMONY OF D. S. CAMERON.

I am tie inspector for the Great Northern Railway Company. Before that I used to buy timber and cut it into ties and sell to the company, and do a little logging sometimes. I am acquainted with and familiar with the method of piling ties upon the lines of other railroads than the Great Northern. I have no particular recollection of having inspected these particular ties at Springdale. In the course of a year I inspect maybe half a million of ties. In connection with these ties that I inspected upon our lines and in connection with ties that I have examined upon the lines of other roads, that have been piled up, I don't know that I have ever seen any that was braced to hold them up. (118) The usual method of piling ties on this road and other roads that I know of they were just piled up in the manner that the inspector can inspect them, even at both ends and up on top of each other; pile them up so

(Testimony of D. S. Cameron.)

that they won't take up the space in the yards. (119)
They are piled up close together, supposed to be piled right up close.

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer he testified: [47]

In other words, they are generally piled up close together. They are usually piled up so as not to take up too much room. I suppose when you pile ties on top of each other they naturally will bind, because if you take a narrow tie six inches wide and put a wide one on top they will bind. (121)

[Testimony of F. E. Newton, for Defendant.]

F. E. NEWTON, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

TESTIMONY OF F. E. NEWTON.

I am a farmer living three and one-half miles east of Colville. At the time this boy got hurt I was in the livery business at Springdale. Came there in December, 1913, when I got the business from Stevens, Jimmey's father, the first of December, 1913. He went to Coulee City, where I traded him a ranch. (122) The Stevens boy was not around six weeks before this accident. He left on the 3d of December, after I took the business. I didn't see the accident. I heard the boy crying. I went down there and asked him what the matter was and "Can't you walk?" He says "No," and I says, "Did you try?" He said, "Yes," so I just picked him up and

(Testimony of F. E. Newton.)

took him home. I didn't go over to where the ties were, to pick them up or anything of that sort. (123)

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer, he testified:

The ties were, I should judge, 25 or 30 feet from the edge of the street. (125)

[Testimony of John Taylor, for Defendant.]

JOHN TAYLOR, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

TESTIMONY OF JOHN TAYLOR.

At the time of the accident to Leslie I was standing in front of the livery barn in Springdale. I saw the boy get hurt. When the ties fell on the boy I ran over there and picked up one end of the tie and helped to get him out from under. There were three ties fell on him. I picked up one of the ties off of him. [48] We helped him over towards the depot, and he sat down there on a pile of dirt, and Mr Newton came along. (127)

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer, he testified:

George Williams was there. He was across by the depot at the time the accident happened, and I was down at the livery stable. He came over and I was over there and lifted the tie off. (128)

[Testimony of Mally Ryan, for Defendant.]

MALLY RYAN, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

TESTIMONY OF MALLY RYAN.

I am section foreman for the Great Northern Railway Company and have been for eleven years, located at Springdale. I was there during the winter of 1913-1914. I was notified of the accident to Leslie Willard shortly afterwards. I didn't see it. It is my business as section foreman to see that they keep the ties back, the clearance from the track. (129) After they have been piled on there we look them over and see that they don't get too many small ties on. They are piled there for inspection, for the company to load and distribute, for renewals for the road. We take these ties from off these piles and distribute them along the right of way wherever they are needed for the roadbed. The purpose in piling these ties in this particular way in which they are piled in these long piles facing the track, is to facilitate loading, make it handier to load them, and for inspection. I have loaded thousands of them. (130)

I have never seen children on the ties before this or since. I have seen them on the right of way. I have seen them come up to the depot. I have told them to get off of there.

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer, he testified:

(Testimony of Mally Ryan.)

My eyesight is good. I am not very much around the [49] depot. (131)

Redirect Examination.

Whereupon, upon redirect examination by Mr. Albert, he testified:

The conditions with reference to buildings and general situation there at Springdale were the same now as they were in 1914 in the winter.

Whereupon, upon the statement of Mr. Plummer, attorney for the plaintiff, that he had no objection to the introduction of the following photographs, Defendant's Exhibits 2, 3, 4, 5 and 6, they were admitted in evidence, are attached hereto and made a part hereof. (132)

Counsel for the defendant described the photographs as follows:

Defendant's Exhibit 2 is a view from the tracks looking south towards the livery barn; a little southwest. Defendant's Exhibit 3 is a view from the road looking south towards the livery barn, and taken just a little north of the tracks. Defendant's Exhibit 4 is a view taken from the depot platform looking east along the tracks.

Mr. PLUMMER.—The tank is east of the station, is it?

Mr. ALBERT.—Yes, the tank is east of the station.

Defendant's Exhibit 5 is a view taken from the livery barn looking towards the depot and Springdale. Defendant's Exhibit 6 is a view taken from

(Testimony of Mally Ryan.)

the livery barn looking northeast towards the water tank. I have marked an "X" on exhibit 4 about where the pile of ties referred to in the evidence was located. (133) The man standing on the left-hand side of the picture on Defendant's Exhibit 3 was where the pile of ties was supposed to have been. The man standing on the right-hand side is standing on the road. When these ties were piled there in that pile, in passing back and forth through there, I stopped and would go over there sometimes, and watch them, and see that those ties were [50] piled back.

Q. How were those ties piled?

A. Well, when they drove in they laid down their skids, then they throwed probably five or six ties, and probably more on the skids, one beside the other, and then started to pile up, and they kept on piling that way until they got eight. They go up gradually until they are finishing their pile, then they square it up. (134)

These piles cannot be piled up in separate tiers of eight each, and was never done to my knowledge. I saw this pile after it was completed. It was piled as they always pile them. They start in, lay the skid down, then they put in another tie as close to it as possible. This pile was piled in the same way. When they throw them ties off they had to make that bottom rank there, that is, the bottom row, and then they come along and up with it. It is impossible to pile a pile straight up without them falling at the

(Testimony of Mally Ryan.)

time, and these end ties that were piled near the end nearest the road, were just slightly canted toward the pile. After they distribute the ties to us we pile them in three cornered piles. There are fifteen ties piled in a pile and they are put that way to season, and then they are put in the track after they are seasoned. They are piled triangularly.

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer, he testified as follows:

These ties were piled in January about two years ago, in 1914. (135, 136) I noticed that the piles were piled back from the track. I have a particular recollection of this pile of ties because I went there to examine them where this boy was hurt. (137)

[Testimony of C. W. Magers for Defendant (Recalled).]

C. W. MAGERS, recalled as a witness on behalf of the defendant, testified as follows:

TESTIMONY of C. W. MAGERS. [51]

Direct Examination by Mr. ALBERT.

Q. Mr. Magers, just tell us how these ties were piled.

Mr. PLUMMER.—We object to that, if Your Honor please, on the ground he has already covered that matter with this witness, and it is repetition of the testimony. He was on the stand yesterday and told all about it, and we cross-examined him. I don't think it is fair, after the night has gone by, to put him on again now on the same subject.

(Testimony of C. W. Magers.)

Mr. ALBERT.—I don't think it is quite clear how these were piled, and I would like to show it to the jury, and get as much light on it as we possibly can.

Mr. PLUMMER.—Yes, I know, you did that yesterday. You cannot certainly dispute what he said yesterday.

The COURT.—The process was explained. I don't know just how they were piled.

Mr. PLUMMER.—He testified he piled one on top of the other.

Mr. ALBERT.—You cannot pile them any other way except one on top of another. (140)

The COURT.—Are all the witnesses here?

Mr. PLUMMER.—Our witnesses are not here, no. They have gone home. We thought this ground was covered, and we cannot dispute it. Our witnesses have gone back to Springdale.

Mr. ALBERT.—I think it is perfectly competent at this time to show just how these ties were laid down there, how these parties put them in.

The COURT.—It would be, under ordinary circumstances, unless advantage was taken of the other side, by reason of the fact that this matter was all gone over yesterday. These three witnesses were called and testified on the subject.

Mr. PLUMMER.—If there is any doubt I will ask the reporter to read the record of this witness. I examined him in [52] detail.

Mr. ALBERT.—They testified that the ties were piled one on the other, one on top of the other. That

does not show whether they were piled up in a straight line, or whether they were piled interlacing, or how they were piled.

The COURT.—If the witnesses for the other side have gone home, I don't think it would be fair to admit the testimony at this time. I will sustain the objection; that is, if it is going to conflict in any way with the testimony already given. (141)

Mr. ALBERT.—It won't conflict with his testimony at all.

Mr. PLUMMER.—And Mr. Albert suggested last night that he was practically through with his evidence, and we allowed our witnesses to go home.

The COURT.—I think I will sustain the objection.

Mr. ALBERT.—Exception.

Witness excused. (142)

**[Testimony of D. S. Cameron, for Defendant
(Recalled).]**

D. S. CAMERON, recalled as a witness on behalf of the defendant, testified as follows:

TESTIMONY OF D. S. CAMERON.

Direct Examination by Mr. ALBERT.

Mark this. Paper marked Defendant's Exhibit 7 for identification.

Q. I show you Defendant's Exhibit 7 and ask you if that is the notice and specifications for ties that was posted and in force at that time—at the time of this accident.

A. Yes, that is the same circular we had out.

Mr. ALBERT.—We offer it in evidence.

(Testimony of D. S. Cameron.)

Mr. PLUMMER.—I wish to object to this, if Your Honor please, on the ground that it is wholly incompetent, irrelevant and immaterial. The question in this case is how the ties were piled, not how some notice said they should be. I don't know whether there is anything in here about piling. [53]

The COURT.—What is the purpose of the notice?

Mr. ALBERT.—The notice shows the specifications under which the ties were piled, and the instructions.

The COURT.—I will sustain the objection. (143)

Mr. ALBERT.—I don't care very much about it, but they hollered yesterday about our not producing it.

Exception.

Q. Your duties as tie inspector, do they relate to the question of inspection, as to the manner in which the ties are piled?

Mr. LAVIN.—We object to that as repetition, what his duties were.

The COURT.—He may answer. I don't recall what he did.

A. Somewhat, yes.

Q. To what extent?

A. To see so I can get the length of the ties.

Q. So that you can get the length of the ties?

A. The length of them, yes.

Mr. ALBERT.—That is all.

Mr. PLUMMER.—That is all.

Witness excused. (144)

[Testimony of U. Sowa, for Defendant.]

U. SOWA, a witness called on behalf of the defendant, being first duly sworn, testified as follows:

TESTIMONY OF U. SOWA.

I am division roadmaster for the Great Northern and have been for the last six years, the second time. I have been connected with the Northern Pacific and the Butte, Anaconda & Pacific. In connection with my business with those roads and other roads I have observed the manner in which ties that are hauled in are piled. (145) I am acquainted with the conditions in Springdale and have been for the last year and a half. I was acquainted with them before that. [54]

Mr. ALBERT.—I think the testimony shows by the witness Mr. Ryan that the conditions were substantially the same.

The COURT.—Yes. (148)

Under those conditions the usual and ordinary and customary method of piling ties on the right of way are they are piled not less than eight feet from the nearest rail, endwise of the track, with flush ends, so that the inspector can see them and eight ties high. When they commence piling they throw skids on the ground and then from eight to ten ties, and then pile them as they come, in layers. They cannot be piled straight up and down in tiers.

Cross-examination.

Whereupon, upon cross-examination by Mr. Plummer, he testified:

They cannot be piled straight up and down in tiers

(Testimony of U. Sowa.)

on account of the ties are not the same width, all the ties. (149) Some of them are fourteen and sixteen inches wide. The narrowest ones are eight inches wide. You can set a fourteen inch tie on top of an eight inch tie, and you can set one on top of the other up to eight. I am testifying as to how they should be piled; they should be laid down on a string of skids, then another string on top of them, and so on up that way. (150) And in that way they would bind each other; there would be a hang over that would bind. That is the way they pile them. If they are bound they won't fall down.

Redirect Examination.

Whereupon, upon redirect examination by Mr. Albert, he testified:

I have no particular recollection of this particular pile of ties.

Mr. ALBERT.—Defendant rests.

Mr. PLUMMER.—We rest.

Whereupon the following proceedings were had:

[Motion for Directed Verdict, etc.]

Mr. ALBERT.—Defendant moves the Court to direct a [55] verdict for the defendant on the ground that no cause of action has been proven against the defendant, either as alleged in the complaint or otherwise; that defendant has not been shown to have been guilty of a breach of any duty toward the plaintiff; that the accident which happened to the plaintiff was caused by the act and negligence of himself and his companion, who was with

him, and not by reason of any negligence on the part of the defendant; that it is not shown that the ties in question were in their nature alluring or attractive to children, or that they were in and of themselves dangerous; nor has it been shown that even if they were not alluring or attractive to children, that although children played with them that they were obviously dangerous if children came in contact therewith; that defendant is entitled to a verdict in its favor on the evidence by the direction of the Court.

The COURT.—The motion is denied.

Defendant excepted to the ruling of the Court in refusing to direct a verdict, which exception was allowed by the Court.

Whereupon, arguments were made to the jury on behalf of the plaintiff and defendant.

Whereupon the Court instructed the jury. Thereupon the jury, having received the charge of the Court, and having retired to consider their verdict returned into open court with a verdict in favor of the plaintiff for damages in the sum of fifteen hundred dollars (\$1500.00).

Whereupon, upon the 26th day of January, 1916, judgment was entered in favor of the plaintiff and against the defendant, in the following language:
[56]

[Title of Court and Cause.]

Judgment.

This cause having heretofore come on regularly

for trial before the Court and a jury, plaintiff appearing in person and by his attorneys, Plummer & Lavin, and the defendant appearing through its attorneys, Charles S. Albert and Thomas Balmer, and said cause having been regularly submitted to the jury and the jury having retired to deliberate upon the verdict, and thereafter having returned their verdict into the court, awarding to the plaintiff the sum of \$1500.00.

It is hereby ORDERED, ADJUDGED and DECREED that upon the verdict of said jury, and the Court being fully advised in the premises, that plaintiff have and recover against defendant, the sum of \$1500.00 and his costs and disbursements hereafter to be taxed.

Done in open court this 26th day of January, 1916.

(Signed) FRANK H. RUDKIN,

Judge.

O. K. as to form.

CHARLES S. ALBERT and
THOMAS BALMER,

Defendant's Attorneys.

[Motion for New Trial.]

Whereupon, upon the 31st day of January, 1916, the defendant herein served and filed its motion for new trial, in words as follows:

Now comes the above-named defendant, and moves the Court [57] for an order to set aside the verdict of the jury herein and grant a new trial of the above-entitled cause, upon the following grounds:

1. Excessive damages appearing to have been

given under the influence of passion or prejudice.

2. Insufficiency of the evidence to justify the verdict.

3. Error in law occurring at the trial and excepted to by the defendant.

4. That neither the evidence nor the testimony is sufficient to show, either directly or indirectly, that the defendant or anyone for whom it was responsible was guilty of any negligence, or that it was guilty of any breach of duty which it owed towards the plaintiff.

5. That the evidence is not sufficient to show that a cause of action has been proven against the defendant, either as alleged in the complaint or otherwise.

6. That the evidence is insufficient to show a cause of action against the defendant in that the accident which happened to the plaintiff was caused by the act and negligence of himself and his companion, who was with him, and not by reason of any negligence on the part of the defendant.

7. That the evidence was insufficient to support a cause of action against the defendant, in that it was not shown that the ties in question were in their nature alluring or attractive to children, or that they were in or of themselves dangerous, nor was it shown that even if they were not alluring or attractive to children, that if children played about them they were obviously dangerous if such children came in contact therewith.

8. That the Court erred at the trial in allowing the witness R. B. Willard to answer the question: "Do you know how many ties fell?" that the Court

erred in denying defendant's motion for nonsuit made at the close of plaintiff's case; that the Court erred in refusing to allow the witness C. W. Magers to [58] answer the question: "Mr. Magers, just tell how these ties were piled"; that the Court erred in refusing to admit Defendant's Exhibit 7 in evidence; that the Court erred in denying the defendant's motion to direct a verdict for the defendant at the close of all the testimony.

Said motion is based upon the pleadings and papers on file, upon the minutes of the court, including not only the clerk's minutes but any notes or memorandum which may have been kept by the Judge of the court in the trial thereof, and also the reporter's transcript of his shorthand notes of said trial.

Dated at Spokane, Wash., this 31st day of January, 1916.

(Signed) CHARLES S. ALBERT,

THOMAS BALMER,

Attorneys for Defendant.

Whereupon, upon the 7th day of February, 1916, said motion for new trial was taken up for hearing by consent of counsel, and said motion was presented to the Court.

Whereupon said Court made its order denying said motion for new trial, which order is as follows:
[Title of Court and Cause.]

Order [Denying Motion for New Trial].

This cause coming on to be heard upon defendant's motion for a new trial, the above-named de-

fendant appearing by Charles S. Albert and Thomas Balmer, its attorneys of record, in behalf of said motion, and the above-named plaintiff appearing by his attorneys Plummer & Lavin, in opposition thereto, after hearing said motion [59] and the Court being duly advised in the premises;

It is ORDERED that said motion be, and the same is hereby denied, to which ruling defendant excepts and exception is allowed.

Done in open court this 7th day of February, 1916.

(Signed) FRANK H. RUDKIN,
Judge. [60]

Defendant's Exhibit No. 7.

**IMPORTANT CHANGES—READ CAREFULLY.
NOTICE.
GREAT NORTHERN RY.
TIES.**

Will be purchased by this Company at its Option until further Notice as per Description, Price and Specifications given hereon, at all stations on the Spokane and Marcus Divisions of the Great Northern Railway in United States between Troy, Mont., and Dean, Wash., including all Main and Branch lines in limits described.

SPECIFICATIONS

ALL HEWED TIES must be peeled and of good round, sound, live timber, exactly eight (8) feet long, straight and well hewed on both sides, free from score hacks and of a uniform thickness, ENDS TO BE SAWED square and the hewed sides to be par-

allel and out of wind. Ties slabbed two sides accepted as hewed.

ALL TIES DELIVERED on this circular must be on basis of Eighty per cent (80%), Number Fifteen (No. 15) and Number Twenty-five (25), and Twenty per cent (20%) Number Sixteen (No. 16) and Number Twenty-six (26). All Number Sixteen (No. 16) and Number Twenty-six (26) ties in excess of twenty per cent (20%) must be removed from Right of Way. All culls and rejected ties not accepted must be removed from Right of Way.

Ties made from fire killed timber that is worm eaten will not be accepted.

Ties varying one inch or more under or over eight (8) feet long will not be accepted.

Tamarac and Red Fir ties filling the above specifications will be graded and paid for as follows:

PRICES.

TAMARAC.

No. 15 Hewed or Slabbed, Peeled, 7 in. face and over, 7 in. thick.....	37¢
No. 16 Hewed or Slabbed, Peeled, 6 in. face and over, 6 or 7 in. thick.....	22¢

RED FIR.

No. 25, Hewed or Slabbed, Peeled, 7 in. face and over, 7 in. thick.....	37¢
No. 26, Hewed or Slabbed, Peeled, 6 in. face and over, 6 or 7 in. thick.....	22¢

[61]

NOTE—Following instructions must be followed in piling ties on right of way:

Permission must be obtained at all stations at which there are Agents to pile ties on the Company's right of way, and Agent will designate place where they are to be piled. Ties must be piled at all stations or sidings between switches on skids at or above grade, convenient for loading.

They must be piled eight ties or more high with a space of three feet between ranks with the small end of each tie facing the track.

The first rank to be not less than eight feet from the nearest rail, and no ties shall be to exceed 50 feet from the track. All ties must be piled even on the ends so Inspector can see whether they are all of an even length.

No peeling of ties will be allowed on Company's right of way.

These instructions must be strictly followed or you will be required to furnish necessary help to re-handle the ties for their protection, economical handling when loading or for inspection.

Cards to show ownership of ties and address of owner will be furnished by the Purchasing Agent, Inspector or Station Agent. They must be filled out in ink, as provided for, and attached to each pile.

Any person or persons violating these terms will be considered trespassers, and will assume all risk and be held liable for all damage caused by their action. All ties put out in accordance with this circular **AND RECEIVED BY THE COMPANY** will be inspected monthly when practicable, commencing with September, 1913, and payments made within

thirty days after the month in which inspection is made.

F. A. BUSHNELL,
Purchasing Agent.

St. Paul, Minn., September 1st, 1913.

WRITE IN FOR PRICES AND SPECIFICATIONS ON SAWED RED FIR AND TAMARAC TIES NINE (9) INCHES FACE, SEVEN (7) INCHES THICK, EXACTLY EIGHT (8) FEET LONG. [62]

Whereupon the defendant excepted to the rendering and entering of judgment in the above-entitled action, ordering and adjudging that the plaintiff herein have and recover of the defendant the sum of fifteen hundred dollars (\$1500.00), together with costs, dated and entered on the 26th day of January, 1916, and to said judgment, which exception was allowed by the Court.

Now, in furtherance of justice and that right may be done, the defendant presents the foregoing as its bill of exceptions in this case, and prays that the same may be cited, signed and certified by the Judge, as provided by law, and filed as a bill of exceptions.

(Signed) CHARLES S. ALBERT,
THOMAS BALMER,

Attorneys for Defendant.

Due service of the within bill of exceptions by a true copy thereof, is hereby admitted at Spokane, Washington, this 31st day of January, A. D. 1916.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff. [63]

[Title of Court and Cause.]

Order Settling Bill of Exceptions.

Now, on this 7th day of February, 1916, the above cause coming on for hearing on the application of the defendant to settle the bill of exceptions in said cause; defendant appearing by Charles S. Albert and Thomas Balmer, its attorneys, and the plaintiff appearing by Messrs. Plummer & Lavin, his attorneys, and it appearing to the Court that the defendant's proposed bill of exceptions was duly served on the attorneys for the plaintiff within the time provided by law, and that no amendments have been suggested thereto by the plaintiff, and that the time for settling said bill of exceptions has not expired, and the Court having duly allowed said proposed bill of exceptions and the amendments thereto; and it further appearing to the Court that said bill of exceptions contains all the material facts occurring in the trial of said cause, together with exceptions thereto, and all the material matters and things occurring upon the trial, except Exhibits 1, 2, 3, 4, 5 and 6, introduced in evidence, which are hereby made a part of said bill of exceptions, and the clerk of this court is hereby ordered and instructed to attach the same thereto;

Therefore, upon motion of Charles S. Albert, attorney for the defendant,

It is hereby ORDERED, that said proposed bill of exceptions, with the amendments allowed by this Court, be, and the same [64] is hereby settled as

a true bill of exceptions in said cause, and that the same is hereby certified accordingly by the undersigned Judge of this court, who presided at the trial of said cause, that it conforms to the truth and that it is in proper form, and that it is a full, true and correct bill of exceptions, and the clerk of this court is hereby ordered to file the same as a record in said cause, and transmit the same to the Honorable Circuit Court of Appeals for the Ninth Circuit.

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Bill of Exceptions. Filed in the U. S. District Court for the Eastern District of Washington, February 7, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [65]

[Title of Court and Cause.]

Petition for Order Allowing Writ of Error.

Defendant in the above-entitled cause, feeling itself aggrieved by the rulings of the Court and the judgment entered on the 26th day of January, 1916, complains in the record and proceedings had in said cause and also of the rendition of the judgment in the above-entitled cause in said United States District Court against said defendant on the 26th day of January, 1916, that manifest error hath happened to the great damage of said defendant, petitions said Court for an order allowing the said defendant to prosecute a writ of error to the Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made

and provided and also that an order be made fixing the amount of the security which the defendant shall give and furnish upon said writ of error, and that upon the giving of such security, all further proceedings of this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioner will ever pray.

Dated this 16th day of February, A. D. 1916.

(Signed) CHARLES S. ALBERT,
THOMAS BALMER,

Attorneys for Defendant. [66]

[Endorsements]: Petition for Order Allowing Writ of Error. Due service of the within petition by a true copy thereof is hereby admitted at Spokane, Washington, this 16th day of February, 1916. (Signed) Plummer & Lavin, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, February 16, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [67]

[Title of Court and Cause.]

Assignment of Errors.

Comes now the defendant and files the following assignment of errors upon which it will rely in the prosecution of the writ of error in the above-entitled cause from the judgment made by this Honorable Court upon the 26th day of January, 1916, in the above-entitled cause.

I.

That the United States District Court in and for the Eastern District of Washington, Northern Division, erred in denying the motion of defendant to direct a verdict in favor of the defendant, made at the close of all the evidence in the case, for the following reasons:

1. That no cause of action has been proven against the defendant.

2. That defendant has not been shown to have been guilty of the breach of any duty towards the plaintiff.

3. That the accident which happened to the plaintiff was caused by the acts and negligence of himself and his companion who was with him, and not by reason of any negligence on the part of the defendant.

4. That it was not shown that the ties in question were in their nature alluring or attractive to children, or that they were in or of themselves dangerous, nor was it shown that even if [68] they were not alluring or attractive to children, that although children played with them, they were obviously dangerous if children came in contact therewith.

5. That the defendant was entitled to a verdict on the evidence, by the direction of the Court.

II.

That the Court erred in denying defendant's motion for a new trial, upon the following grounds:

1. Insufficiency of the evidence to justify the verdict.

2. Error in law occurring at the trial and excepted to by the defendant.

3. That neither the evidence nor the testimony was sufficient to show that defendant was guilty of any negligence or any breach of duty towards the plaintiff.

4. That the evidence was not sufficient to show that a cause of action had been proven against the defendant.

5. That the evidence was insufficient to show a cause of action against the defendant, in that the accident to the plaintiff was caused by his own negligence and that of his companion, and not by reason of any negligence on its part.

6. That the evidence was insufficient to support a cause of action against the defendant, in that it was not shown that the ties in question were in their nature alluring or attractive to children, or that they were in or of themselves dangerous, nor was it shown that even if they were not alluring or attractive to children, that if children played about them they were obviously dangerous if such children came in contact therewith.

7. That the Court erred in admitting and rejecting evidence, as is more fully set forth hereinafter in this assignment of errors.

III.

That the Court erred in allowing the witness R. B. [69] Willard to answer the question:

“Do you know how many ties fell?” as follows:

“I can’t say positively, six, seven or eight, something like that, I can’t say.”

IV.

That the Court erred in refusing to allow the witness C. W. Magers to answer the question:

“Mr. Magers, just tell how these ties were piled.”

V.

That the Court erred in refusing to admit defendant's Exhibit 7 in evidence, which said Exhibit 7 is set forth in full in said bill of exceptions.

VI.

That the Court erred in rendering and entering judgment in said action, in favor of the plaintiff and against the defendant.

WHEREFORE, the said Great Northern Railway Company, plaintiff in error, prays that the judgment of the District Court of the United States for the Eastern District of Washington, Northern Division, be reversed, and that said District Court be directed to grant said defendant a new trial in said action.

(Signed) CHARLES S. ALBERT,

THOMAS BALMER,

Attorneys for Plaintiff in Error, Defendant in Lower Court.

[Endorsements]: Assignment of Errors. Due Service of the Within Assignment of Errors by True Copy Thereof is Hereby Admitted at Spokane, Washington, this 16th day of February, 1916. (Signed) Plummer & Lavin, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, February 16, 1916, at 10:45 A. M. W. H. Hare, Clerk. By S. M. Russell, Deputy. [70]

[Title of Court and Cause.]

Order Allowing Writ of Error.

Upon motion of Charles S. Albert and Thomas Balmer, Esqs., attorneys for defendant, and upon filing a petition for writ of error and an assignment of errors:

It is ORDERED, that a writ of error be, and hereby is allowed, to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be and hereby is fixed at the sum of thirty-five hundred dollars (\$3500.00), which said bond may be executed by said defendant as principal, by its attorneys herein, and by such surety or sureties as shall be approved by this Court, and which shall operate as a supersedeas bond, and a stay of execution is hereby granted, pending the determination of such writ of error.

Dated this 16th day of February, 1916.

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Order Allowing Writ of Error. Service of the Within Order by a True Copy Thereof is Hereby Admitted at Spokane, Washington, this 16th day of February, A. D. 1916. (Signed) Plummer & Lavin, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, February 16, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [71]

[Writ of Error (Copy).]

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you at the September, 1915, term thereof, between Leslie Willard, a minor, by Joseph J. Lavin, his guardian *ad litem*, plaintiff, and the Great Northern Railway Company, defendant, a manifest error hath happened, to the great damage of the said Great Northern Railway Company, plaintiff in error, as by its complaint appears;

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 4th day of March, next, in the said Circuit Court of Appeals, to be then and there held, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 16th day of February, 1916, of the Independence of the United States the one hundred fortieth year.

[Seal] (Signed) W. H. HARE,
Clerk of the District Court for the Eastern District
of Washington, Northern Division. [72]

Allowed by:

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Writ of Error. Service of the Within Writ of Error and Receipt of Copy Thereof is Hereby Admitted this 16th day of February, 1916. (Signed) Plummer & Lavin, Attorneys for Defendant in Error. Filed in the U. S. District Court for the Eastern District of Washington, February 16, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [73]

[Title of Court and Cause.]

[Order Fixing Amount of Bond on Writ of Error.]

Defendant, Great Northern Railway Company, having this day filed its petition for a writ of error from the rulings, decisions and judgment made and entered in said action to the United States Circuit Court of Appeals, in and for the Ninth Judicial Circuit, together with an assignment of errors within due time, and also praying that an order be made fixing the amount of security which it should give and furnish upon said writ of error, and that upon

the giving of said security all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Circuit, and said petition having been this day duly allowed;

Now, therefore, it is ORDERED, that upon the said defendant, Great Northern Railway Company, filing with the clerk of this court a good and sufficient bond in the sum of thirty-five hundred dollars (\$3500.00), to the effect that if the said Great Northern Railway Company, plaintiff in error, shall prosecute said writ of error to effect, and answer all damages and costs if it fails to make its plea good, then the said obligation to be void, else to remain in full force and virtue, the said bond to be approved by the Court; that all further proceedings in this court be and they are hereby suspended and stayed until the determination [74] of said writ of error by the said United States Circuit Court of Appeals.

Dated this 16th day of February, 1916.

(Signed) FRANK H. RUDKIN,
District Judge.

[Endorsements]: Order Allowing Bond. Due Service of the Within Order by a True Copy Thereof is Hereby Admitted at Spokane, Washington, this 16th day of February, 1916. (Signed) Plummer & Lavin, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, February 16, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [75]

[Title of Court and Cause.]

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, Great Northern Railway Company, as principal, and National Surety Company of New York, as surety, are held and firmly bound unto Leslie Willard, a minor, by Joseph J. Lavin, his guardian *ad litem*, in the full and just sum of three thousand five hundred dollars (\$3500.00), to be paid to the said Leslie Willard, a minor, by Joseph J. Lavin, his guardian *ad litem*, for which payment well and truly to be made, we bind ourselves, and our and each of our successors and assigns, firmly by these presents.

Sealed with our seals and dated this 16th day of February, 1916.

WHEREAS, lately at the September Term, A. D. 1915, of the District Court of the United States for the Eastern District of Washington, Northern Division, in a suit pending in said court between Leslie Willard, a minor, by Joseph J. Lavin, his guardian *ad litem*, plaintiff, and the Great Northern Railway Company, defendant, a final judgment was rendered against the said defendant, and the said defendant Great Northern Railway Company, having obtained from said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to said Leslie Willard, a minor, by Joseph J. Lavin, his guardian *ad litem*, is about to be issued, citing and admonishing him to be and appear [76] at the United States Circuit Court of Appeals for the

Ninth Circuit, to be holden at the City of San Francisco, thirty days from and after the filing of said citation;

Now, the condition of the above obligation is such, that if the said Great Northern Railway Company shall prosecute its writ of error to effect and shall answer all damages and costs that may be awarded against it, if it fails to make its plea good, then the above obligation to be void; otherwise to remain in full force and effect.

[Seal]

(Signed) GREAT NORTHERN RAILWAY
COMPANY.

By CHARLES S. ALBERT and
THOMAS BALMER,

Its Attorneys.

NATIONAL SURETY COMPANY.

By LESTER P. EDGE,
Resident Vice-President.

E. F. BOOTH,

Resident Assistant Secretary.

Plaintiff is satisfied with the within bond and the surety thereon.

(Signed) PLUMMER & LAVIN,
Attorneys for Plaintiff.

The foregoing bond is approved as to form, amount and sufficiency of surety, this 16th day of February, 1916.

(Signed) FRANK H. RUDKIN,
Judge of the United States District Court, Eastern
District of Washington.

[Endorsements]: Bond on Writ of Error. Due service of the within bond by a true copy thereof is hereby admitted at Spokane, Washington, this 16th day of February, 1916. (Signed) Plummer & Lavin, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, February 16, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [77]

[Citation on Writ of Error.]

The President of the United States, to Leslie Willard, a Minor, by Joseph J. Lavin, His Guardian *ad Litem*, and to Messrs. Wm. H. Plummer and Joseph J. Lavin, His Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Eastern District of Washington, Northern Division, wherein Leslie Willard, a minor, by Joseph J. Lavin, his guardian *ad litem*, is plaintiff and you are defendant in error, and the Great Northern Railway Company is defendant and is plaintiff in error, to show cause, if any there be, why the judgment in the said writ of error mentioned, should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the

United States of America, this 16th day of February, A. D. 1916, and the Independence of the United States the one hundred fortieth.

[Seal] (Signed) FRANK H. RUDKIN,
United States District Judge for the Eastern District of Washington.

Attest: (Signed) W. H. HARE,
Clerk.

[Endorsements]: Citation. Due Service of the Within Citation by True Copy Thereof is Hereby Admitted at Spokane, Washington, this 16th day of February, A. D. 1916. (Signed) Plummer & Lavin, Attorneys for Plaintiff. Filed in the U. S. District Court for the Eastern District of Washington, February 16, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [78]

[Title of Court and Cause.]

Stipulation for Making Up Record.

It is hereby STIPULATED between the plaintiff, by his attorneys, and the defendant by its attorneys, that the transcript of record on the writ of error in the above-entitled cause shall be made up of the following papers:

Complaint.

Answer.

Reply.

Verdict.

Defendant's Motion for New Trial.

Order Denying Motion for New Trial.

Judgment.

Bill of Exceptions.

Petition for Writ of Error.

Assignment of Errors.

Bond on Writ of Error.

Order Allowing Bond.

Order Allowing Writ of Error.

Stipulation as to Making Up Record.

Writ of Error.

Dated this 16th day of February, 1916.

(Signed) PLUMMER & LAVIN,
Attorneys for Defendant in Error and Plaintiff.

CHARLES S. ALBERT,
THOMAS BALMER,
Attorneys for Plaintiff in Error and Defendant.

[Endorsements]: Stipulation for Making Up Record. Filed in the U. S. District Court for the Eastern District of Washington, February 16, 1916. W. H. Hare, Clerk. By S. M. Russell, Deputy. [79]

[Endorsed]: No. 2753. United States Circuit Court of Appeals for the Ninth Circuit. Great Northern Railway Company, a Corporation, Plaintiff in Error, vs. Leslie Willard, a Minor, by Joseph J. Lavin, His Guardian *ad Litem*, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the Eastern District of Washington, Northern Division.

Filed February 29, 1916.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

[Writ of Error (Original).]

The President of the United States of America, to the Honorable, the Judge of the District Court of the United States for the Eastern District of Washington, Northern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said District Court before you at the September, 1915, term thereof, between Leslie Willard, a minor, by Joseph J. Lavin, his guardian *ad litem*, plaintiff, and the Great Northern Railway Company, defendant, a manifest error hath happened, to the great damage of the said Great Northern Railway Company, plaintiff in error, as by its complaint appears;

We being willing, that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid and all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco in the State of California, on the 4th day of March next, in the said Circuit Court of Appeals, to be then and there held, to the end that the record and proceedings aforesaid being inspected, the United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of

the United States should be done.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the Supreme Court of the United States of America, this 16th day of February, 1916, of the Independence of the United States the one hundred fortieth year.

[Seal]

W. H. HARE,

Clerk of the District Court for the Eastern District of Washington, Northern Division.

Allowed by

FRANK H. RUDKIN,

District Judge.

Service of the within writ of error and receipt of copy thereof is hereby admitted this 16th day of February, 1916.

PLUMMER & LAVIN,

Attorneys for Defendant in Error.

[Endorsed]: 2344. In the District Court of the United States for the Eastern District of Washington, Northern Division. Leslie Willard, a Minor, by Joseph J. Lavin, His Guardian *ad Litem*, Plaintiff, vs. Great Northern Ry. Co., Defendant. Writ of Error. Filed in the U. S. District Court, Eastern District of Washington. Feb. 16, 1916. Wm. H. Hare, Clerk. S. M. Russell, Deputy.

No. 2753. United States Circuit Court of Appeals for the Ninth Circuit. Filed Feb. 29, 1916. Frank D. Monckton, Clerk U. S. Circuit Court of Appeals, for the Ninth Circuit. By Paul P. O'Brien, Deputy Clerk.

